No. 448

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IN THE

Supreme Court of the United States

October Term, 1965

IN THE MATTER OF THE APPLICATION

OF

DR. MARK STERNFELS,

Petitioner,

For a Review under Article 78 of the Civil Practice Act, of the Determination of the

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, and the Order of the State Education Department and JAMES E. ALLEN, JR., Commisioner of Education,

Respondents,

suspending petitioner's license to practice as a veterinarian in the State of New York.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and the Supreme Court of the State of New York, Appellate Division, Third Department

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Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and the Supreme Court of the State of New York, Appellate Division, Third Department

Petitioner, Dr. Mark Sternfels, respectfully prays that a writ of certiorari issue to review an order of the Court of Appeals of the State of New York, entered in the above entitled case on May 20, 1965, which order denied petitioner's motion for leave to appeal to the Court of Appeals and to review the order of the Appellate Division, Third Department of the Supreme Court of the State of New York, dated April 7, 1964 which sustained the order and

determination of the respondents, suspending petitioner's license to practice as a veterinarian in the State of New York.

Opinions Below

There is no opinion by the Court of Appeals. The opinions and determinations of the Appellate Division, Third Department, dated March 27, 1964, April 7, 1964, and March 8, 1965, are attached to the certified transcript of the record (designated as Record on Review and referred to herein as R.) filed with this petition for certiorari.

Jurisdiction

The order of the Court of Appeals of the State of New York denying petitioner leave to appeal to that Court was issued on May 20, 1965. Various petitions for a stay of the order suspending petitioner's license to practice as a veterinarian were denied by the Supreme Court of the State of New York, Appellate Division, Third Department, and by Mr. Justice Harlan of this court on June 21, 1965. The jurisdiction of this court is invoked under 28 U. S. C. 1257 (3).

Questions Presented

The Appellate Division, Third Department, of the Supreme Court of the State of New York, affirmed an order of the respondents suspending petitioner's license to practice as a veterinarian in the State of New York for six months. The questions presented here are:

1. Whether Section 6712 of the Education Law of the State of New York, under which petitioner has been found

guilty of "unprofessional conduct", meets constitutional requirements of due process, in light of the fact that the Board of Regents have failed to promulgate any rules to define and clarify the words "unprofessional conduct" or set any standards of what constitutes "unprofessional conduct".

2. Whether Section 6712 of the Education Law of the State of New York is being administered and applied in an unequal manner and in violation of petitioner's constitutional rights.

Statutes and Regulations Involved

The relevant provisions of Section 6712 of the Education Law of the State of New York are as follows:

> "1. The department may revoke the license of a practitioner of veterinary medicine or annul his registration or both for any of the following causes:
>
> f. Advertising for patronage by means of handbills, posters, billboards, circulars, stereopticon slides, motion pictures, radio, television, newspapers, magazines, classified directories, or any other printed publications or mediums; or by means of flamboyant, glaring or flickering signs; or by means of any signs containing as part thereof any representation of an animal or any part of an animal. The board of regents may promulgate rules to define and clarify, when necessary, the above prohibitions against advertising.
>
> g. Unprofessional conduct. The board of regents may promulgate rules to define and clarify, when necessary, unprofessional conduct."

The Rules of the Board of Regents, with respect to advertising, are as follows:

"§54. ADVERTISING. Advertising in the practice of veterinary medicine within the meaning of section 6712, subdivision 1, of the Education Law shall include any use of any of the media set forth in subparagraph f of subdivision 1 of said section except the following:

1. Listing in telephone directories other than classified directories, provided such listing is not in boldface type.

2. Listing in classified telephone directories under the heading 'Veterinarians,' provided that all such listings shall be uniform as to size, style, and type and provided further that no boldface type is used in such listing and that no information is given in such listing in addition to name, office address and telephone number, residence address, and telephone number if different from office, and a telephone number for use if office or residence does not answer. Such listing may include any limitation of practice but shall not include any claim of specialization or any reference to special services or special equipment.

3. The announcement by a veterinarian of the opening of a practice or a new office, provided that such announcement shall include only the name, office address and telephone number, any limitation in type of practice, residence address and telephone number for use if office telephone does not answer, and, in addition thereto, the professional degree, office hours, and date of opening of office, and provided further that such announcement, if published in a newspaper, shall not be

published in more than three issues of the local newspaper, which publications shall be consecutive, and provided further that such published announcement shall not exceed one column in width and 1½ inches in length.

4. Nothing contained herein shall be construed as preventing the listing of veterinary hospitals in classified telephone directories under the heading, provided such listing is under a business classification and provided further that in such listing the information provided with respect to the veterinarians maintaining said hospitals shall conform to the provisions of paragraphs 1 and 2 hereof."

The Board of Regents have not promulgated any Rules or Regulations clarifying or defining unprofessional conduct.

The Fourteenth Amendment to the Constitution of the United States provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws."

Statement

On or about August 22, 1962 an investigator of the Department of Education of the State of New York presented three specified charges to that Department and

the State Board of Veterinary Examiners praying for a revocation of petitioner's license to practice veterinary medicine in the State of New York, and the annulment of petitioner's registration as a veterinarian. The first specification charged petitioner with unprofessional conduct within the meaning of Section 6712, subd. 1(g) of the Education Law of the State of New York. The second specification charged the petitioner with advertising for patronage within the purview and meaning of Section 6712, subd. 1(f) of the Education Law. The third specification charged petitioner with gross inefficiency in the practice of veterinary medicine. The first two specifications involved the same alleged incident, the fact that a hand-painted sign, 5⅝ inches wide by 8½ inches high, was displayed in November, 1961, in a pet store in Mount Vernon, New York, which sign stated that a 48 hour guarantee was given on all puppies and that purchasers of puppies could obtain a free examination given by the petitioner (R. 47).

On October 1, 1962 a hearing was held on the charges before a sub-committee of the Committee on Grievances of the State Board of Veterinary Examiners. On October 2, 1962, the sub-committee filed a report which dismissed the charge of gross inefficiency and found that the charge on the first two specifications, charging unprofessional conduct and advertising for patronage had been sustained by sufficient legal evidence (R. 54-61). The sub-committee recommended that petitioner's license be suspended for a period of one year. Subsequently, a hearing was held before the Regents Committee on Discipline, and on or about March 29, 1963 the Regents Committee on Discipline voted to sustain the findings of the sub-committee but modified the recommendation of a one year suspension to a six months' suspension (R. 69-73). This report of the Regents Committee contained a totally erroneous

and inaccurate statement, namely, that the State Board of Veterinary Examiners had "found as a matter of fact that respondent had arranged with two pet shops to give free examinations of puppies" (R. 71). This report, containing this inaccurate statement, since it is conceded that only one pet shop was involved, was forwarded to the Board of Regents and was acted upon by them as well as by the State Education Department and its Commissioner. The latter signed the order of suspension on April 10, 1963.

Following service of the order of suspension, a proceeding for review was instituted and on March 27, 1964 the Appellate Division, Third Department confirmed the determination. Thereafter, on April 7, 1964 that Court, on its own motion, filed a corrected decision. The first decision stated that the sign in question had been placed in the window of the shop; the corrected decision was changed to show that the sign had never been in the window of the shop but had been placed in the front of the store, actually being placed on the inside of the door so that it could only be seen by people inside the shop. Petitioner filed a motion for reargument, in which motion petitioner argued that he was being deprived of due process of law as guaranteed him under the Constitution of the United States, which motion was denied, without opinion, by the Appellate Division on May 26, 1964, the order and judgment being entered on December 30, 1964 and a copy of that order and judgment was received by the attorneys for petitioner on January 15, 1965.

On February 4, 1965, by notice of motion returnable before said Appellate Division on February 15, 1965, petitioner applied to said Court for an order allowing said petitioner to appeal to the Court of Appeals, certifying that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals, and for

an order remanding the matter to the State Board of Regents for the introduction of additional evidence. In those motion papers, which are attached to and made part of the certified record, petitioner argued and offered evidence to show that Section 6712 of the Education Law of the State of New York violated the Constitution of the United States, in that there was no definition of the words "unprofessional conduct", and such lack of definition made that provision of the Education Law, as it was applied to petitioner, unconstitutional because of its vagueness and lack of due process, and that the Board of Regents' failure to stop others from advertising for patronage has resulted in the Education Law being administered and applied in an unequal manner, so as to deny to petitioner the equal protection of the laws. Included in these motion papers, which are part of the certified record, are affidavits and exhibits showing instances of advertising by other veterinarians. These motions were in all respects denied, without opinion, by the Appellate Division, by an order entered in the Office of the Clerk of said court on April 2, 1965.

On April 30, 1965, by notice of motion returnable before the Court of Appeals of the State of New York, on May 17, 1965, petitioner applied to the Court of Appeals for an order allowing said petitioner to appeal to the Court of Appeals. This motion was in all respects denied, without opinion, by the Court of Appeals, on May 20, 1965. Thereafter, various applications by the petitioner for a stay of the order suspending petitioner's license, pending the filing of a petition for a writ of certiorari to this court, including an application to Mr. Justice Harlan, were all denied, and on July 1, 1965, agents of respondents seized petitioner's license to practice as a veterinarian in the State of New York, and petitioner has not so practiced since that date.

Specification of Errors to be Urged

The court below erred in affirming the respondents' suspension of petitioner's license to practice as a veterinarian.

Reasons for Granting the Writ

1. Petitioner has been found guilty of "unprofessional conduct" under Subdivision 1 (g) of Section 6712 of the Education Law of the State of New York. That law simply states that the Department of Education may revoke the license of a practitioner of veterinary medicine for "unprofessional conduct" and then states that "the Board of Regents may promulgate rules to define and clarify, when necessary, unprofessional conduct." The Board of Regents has never promulgated any rules to define or clarify the words "unprofessional conduct". All it has done is to rule that in this case, the sign inserted in the pet shop, a small hand painted sign, 5⅝ inches by 8½ inches constituted advertising for patronage, and that, in turn, is "unprofessional conduct". It is respectfully submitted that, as a matter of law, the sign cannot be held to be advertising for patronage, since there was nothing in the sign that solicited patronage. All the sign contained was petitioner's last name; there was nothing on the sign to inform anyone where they could find petitioner, what his address was, or even his telephone number, and all the sign offered was a free examination. To allow petitioner to suffer the suspension of his license because of alleged unprofessional conduct on the state of this record cannot meet any constitutional test. For the words "unprofessional conduct" are not susceptible of objective measurement and do not inform as to what the State commands or forbids. As this Court

has held time and time again, a law forbidding conduct in terms so vague that men of common intelligence must necessarily guess its meaning and differ as to its application violates due process of law. *Baggett* v. *Bullitt*, 377 U. S. 360, and cases there cited. Here, a small sign inside a door is held to be unprofessional conduct, while, as can be seen from the record in this proceeding, listing a veterinarian's name, address and telephone number in connection with free examination of animals obtained by the public from the A.S.P.C.A. does not. Nor, apparently, is it unprofessional conduct for a veterinarian to display his name on signs or give his name and address in radio broadcasts or in newspaper stories. Clearly, petitioner, and others similarly situated, would have to guess at the meaning of the words "unprofessional conduct", until the Board of Regents at a later date, after a hearing, determines that a course of conduct, or even one act, violates the Board of Regents' then standard of what constitutes unprofessional conduct. Certainly no statute calling for as drastic a penalty as revocation of a license and annulment of a registration to practice veterinary medicine can meet the constitutional standard of due process, when petitioners have to guess at the meaning of the words "unprofessional conduct". And there can be no objective measurement of what constitutes "unprofessional conduct" when all that is required is that a constantly changing group of men, using changing standards, find a person guilty of what to them might then constitute unprofessional conduct, and at the same time, by their inaction, hold that similar conduct by others does not constitute unprofessional conduct.

2. As shown in the record, other veterinarians throughout Westchester County, New York, the area in which petitioner practices, are violating Section 6712 of the

Education Law. They are using flamboyant, glaring and flickering signs; they are using signs containing, as part thereof, representations of an animal or parts of an animal; they are using radio interviews and broadcasts; they are using feature stories in newspapers. All of these are specifically prohibited by Subdivision 1 (f) of Section 6712, as constituting advertising for patronage. Yet none of them has been charged with unprofessional conduct or advertising for patronage. The Board of Regents of the State of New York and the Commissioner of Education are administering and applying Section 6712 of the Education Law in an unequal manner and in violation of petitioner's constitutional rights. *Yick Wo* v. *Hopkins,* 118 U. S. 356.

But beyond that, what petitioner did—offer a free examination—was being done from 1960 on and is still being done by 47 other veterinarians in Westchester County. For when a person obtains an animal from the Westchester A.S.P.C.A., which is a private, nongovernmental agency, the A.S.P.C.A. delivers a letter to him listing the names, addresses and telephone numbers of the veterinarians, and stating that the veterinarian will give the animal "an examination free of charge" (R. 38-40).

This statute, since it involves revocation of a license and annulment of a registration, valuable property rights, must meet constitutional standards. By the Fourteenth Amendment of the United States Constitution, petitioner is guaranteed the equal protection of the laws. *Griffin* v. *School Board,* 377 U. S. 218. Here, the Board of Regents' unequal application of the law to this petitioner is enough to condemn its action. It is incumbent on the Board of Regents and the Commissioner of Education to administer the Education Law in a fair and equal manner. Any agency of the government, be it State or Fed-

eral, cannot unequally enforce a valid law, for when it does, it violates the constitutional prohibition against discriminatory enforcement of non-discriminatory laws, and denies to persons like petitioner the equal protection of the law.

Petitioner is entitled to equal enforcement of the laws. There cannot be equal enforcement of laws when petitioner is found guility of violating Subdivision 1(f) of Section 6712 on the ground of advertising for patronage, involving the use of a small sign on the inside of a store, whereas there is no enforcement in cases involving advertising by means of billboards, large standing signs, some with representations of animals, and use of radio and newspaper stories, all of which are specifically forbidden by Section 6712. The Board of Regents and the Education Department have the responsibility for seeing that the Education Law of the State of New York is applied in a constitutional manner, fairly, equitably and equally. When the Board of Regents fails to carry out its duties, it has made the statute as administered constitutionally defective and in violation of the equal protection clause of the Fourteenth Amendment. *Bush* v. *Bell,* 274 U. S. 200. For when the law lays an unequal hand on those who have committed intrinsically the same offense, it has made an invidious discrimination and is unconstitutional. *Yick Wo* v. *Hopkins, supra;* see also "Discriminatory Law Enforcement and Equal Protection From the Law", 59 Yale L. Rev. 354, and "The Right of Non-discriminatory Enforcement of State Penal Laws", 61 Col. L. Rev. 1103.

At the very least, petitioner should not stand convicted on a record which suggests that a small sign, containing petitioner's name, violates the law, but a large sign, containing a veterinarian's name, or having one's name

and address mentioned to 225,000 people via radio broadcast, does not violate the law. And that an offer of a free examination constiutes "unprofessional conduct" when it is done in a private pet shop, but it is not "unprofessional conduct" if a free examination is offered via a private agency.

Conclusion

This litigation has already drastically affected petitioner. But involved in this case are the rights of all veterinarians, as well as the interest of the general public. The veterinarians need to know what standards they have to live up to, what the rules are, and what constitutes advertising for patronage. They must be assured that these standards and rules are being enforced fairly and uniformly. The public not only has that interest, but also has an interest in seeing that Section 6712 of the Education Law of the State of New York is constitutional and is being administered in a constitutional manner.

For all of the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Counsel for Petitioner.

APPENDIX

Decision of April 7, 1964

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

CORRECTED DECISION

April 7, 1964 6305

In the Matter of the Application of
DR. MARK STERNFELS,

Petitioner,

For a Review under Article 78 etc.,
BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, etc.,

Respondents.

This proceeding seeks a review of the determination of the Board of Regents and the order of the Commissioner of Education suspending the license of the petitioner, a veterinarian, for a period of six months.

The petitioner was deemed guilty of two specifications. 1. Under professional conduct within the meaning of Section 6712, subd. 1 (g) of the Education Law in that he entered into an agreement with the owner of a pet shop to refer purchasers of puppies to the petitioner for free examinations and in furtherance thereof, a sign was placed in the front of the store, between the display window and the door advertising the offer of free examinations of puppies by the petitioner. 2. Advertising for

patronage within the purview and meaning of Section 6712, subd. 1 (f) of the Education Law in that the petitioner permitted a sign to be displayed in the pet shop "with the end in view that some persons might be induced to become regular clients".

Section 6712 of the Education Law, as pertinent hereto, reads:

> "Revocation of license and annulment of registration
>
> 1. The department may revoke the license of a practitioner of veterinary medicine or annul his registration or both for any of the following causes:
>
> * * * * *
>
> f. Advertising for patronage by means of handbills, posters, billboards, circulars, stereopticon slides, motion pictures, radio, television, newspapers, magazines, classified directories, or any other printed publications or mediums; or by means of flamboyant, glaring or flickering signs; or by means of any signs containing as part thereof any representation of an animal or any part of an animal. The board of regents may promulgate rules to define and clarify, when necessary, the above prohibitions against advertising.
>
> g. Unprofessional conduct. The board of regents may promulgate rules to define and clarify when necessary, unprofessional conduct. As amended L. 1955, c. 496, eff. Jan. 1, 1956."

In our opinion, there is substantial evidence to sustain the determination.

It is uncontroverted that petitioner knew the sign was in the shop and did nothing about it. Two witnesses testified that the owner of the shop called their attention to the sign. The petitioner testified that he was performing the services free to promote good public relations and referred to services performed by the Westchester County Veterinary Medical Association, of which he was a member, as being similar.

The credibility of the petitioner was an issue to be determined by the subcommittee which did not accept the petitioner's version but found that the purpose of the agreement was "to induce prospective clients to his office". We recently stated in *Matter of Burns* v. *Board of Regents* (17 A. D. 2d 1011): "However, the board was not bound to accept petitioner's excuses or explanations of his acts. The acts themselves permit an inference of guilty knowledge and intent as a factual determination, and substantial evidence supports the findings."

The petitioner further contends that the order must be annulled because of an inaccuracy in a report from the Regents' Committee on Discipline to the Board of Regents. In the recommendations of this committee to the board it was erroneously stated that the petitioner had entered into an agreement with two pet shops to give free examinations. It is conceded that the specifications and proof related to a sign in one pet shop.

We find no merit to this contention. The order of suspension from which the appeal is taken is based upon the records, findings and determination of the State Board of

Veterinary Medical Examiners and not on the report of the Regents' Committee where the error appears. In any event, the inaccuracy did not go to the merits of the issue and we do not perceive any prejudice to the petitioner. The board, after due consideration, reduced the penalty from the recommended one year suspension to six months.

Finally, it is argued that the measure of sentence was too severe. The record discloses that as to punishment, the board took into consideration the prior good standing of the petitioner and his length of time in practice and we find no basis for interfering with the imposed punishment.

Determination confirmed, without costs.

GIBSON, P. J., HERLIHY, REYNOLDS, AULISI and HAMM, JJ., concur.